IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 15TH OCTOBER 2007 / 23RD ASWINA 1929

RSA.No. 641 of 2006()

AS.108/2001 of SUB COURT, KASARAGOD
OS.226/1998 of ADDL. MUNSIFF COURT, KASARAGOD

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APPELLANTS/APPELLANTS/DEFENDANTS

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1. BHAGIRATHI G SHENOY,
   W/O.LATE K.GOKULDAS SHENOY,

2. K.VISWANATHA SHENOY,
   S/O.LATE K.GOKULDAS SHENOY.

3. K.PUNDALAIKA SHENOY, S/O.DO.

4. K.SANTHERI SHENOY, D/O. DO.

5. K.GANGA SHENOY, D/O. DO/.

6. K.SHAMBHAVAI SHENOY, D/O.DO.

7. K.LAXINARAYANA SHENOY, S/O.DO.

8. K.NANDABAL SHENOY, S/O.DO.

9. K.RAMAKRISHNA SHENOY, S/O.DO.

10. K.MEERA SHENOY, D/O.DO.

11. K.RAMANATH SHENOY, S/O.DO.

12. K.SURESH SHENLOY, S/O.DO.
    (ALL RESIDING AT SHANTHI NAGAR AT KARANDAKKAD,
    KASARAGOD KASBA VILLAGE, POST KASARAGOD,
    KASARAGOD TALUK AND DISTRICT.

BY ADV. SMT.T.D.RAJALAKSHMI

RESPONDENTS: RESPONDENT/PLAINTIFF

A.GANAPATHY NAYAK,
S/O.LATE K.NARAYA NAYAK, RESIDING AT FORT ROAD,
KASARAGOD KASBA VILLAGE, POST KASARAGOD, KASARAGOD
TALUK AND DISTRICT.

BY ADV. SRI.S.VINOD BHAT

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 15/10/2007 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

ORDER IN I.A.No.1677/2006 in R.S.A. No.641/2006

15.10.07 DISMISSED Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 641 OF 2006

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Dated this the 15th day of October, 2007

JUDGMENT

Defendants in O.S.226/1998 before Munsiff Court, Kasaragod are the appellants. Plaintiff is the respondent. Respondent instituted the suit seeking a decree for damages of Rs.40,000/- alleging that plaint A schedule property which originally belonged to Ratnavathi Bai and others was purchased by respondent as per sale deed dated 22.10.1966 and the building in plaint A schedule property with appurtenant land was obtained by Vaman Shanbhogue on lease from Ratnavathi Bai for a term of five years and respondent filed R.C.O.P.13/1969 for eviction of respondent for arrears of rent and an order of eviction was passed which was vacated on depositing of arrears of rent and later respondent filed R.C.P.30/1981 for eviction of respondent and it was allowed by the Rent Control Court and R.C.A 27/1997 and

28/1997 are pending before Rent Control Appellate Authority challenging the order of eviction and during the pendency of appeals, appellants cut two mango trees from the plaint schedule property to make unlawful gain and appellants have absolutely no manner or right over the mango trees and therefore they are liable to pay damages. Appellants in their written statement contended that they did not admit that plaint A schedule property originally belonged to Ratnavathi Bai or that it was purchased by respondent or that Vaman Shanbhogue obtained the building on lease. According to appellants, Vaman Shanbhogue obtained 33 cents in R.S.No.41/10 as per an oral lease in 1933 and appellants are his legal heirs and they effected valuable improvements in the property and they did not cut two mango trees as alleged. It was contended that there was only one mango tree and the same was standing on the western most portion of the property and during the second week of June, 1998 there was a violent gale and as a result the mango tree was broken and on account of breaking of the tree it was causing damage and

nuisance to the adjacent temple and building and the public and therefore the mango tree was cut by appellants and it was not an unlawful act and they are not liable to pay any damages. It was contended that damages claimed is excessive and respondent is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of Pws.1 and 2 and DW1, and Exts.A1 to A3, B1 to B5 and C1 and X1 found that there was only one mango tree in the plaint A schedule property and it was cut and removed by appellants and they are liable to pay the damages. Relying on Ext.C1 report as well as Ext.A3 report submitted by the Commissioner in R.C.A.26/1997 which was in respect of the building in plaint A schedule property filed by respondent against appellants, it was found that value of tree cut was Rs.27,506 as estimated by the Commissioner and proved by his evidence as PW2. Suit was decreed directing appellants to pay Rs.27,506/- with interest at 9% per annum from the date of suit as damages. Appellants challenged decree and judgment before Sub Court,Kasaragod in

A.S.108/2001. Learned Sub Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellants was heard.

4. The argument of learned counsel appearing for appellants is that courts below did not consider the real dispute in the case namely whether mango tree was fallen in a violent gale as alleged in the written statement or was cut and removed by appellants as claimed by respondent. It was argued that apart from the evidence of PW1, there is no evidence to prove that mango tree was cut by appellants and in such circumstance, finding of courts below that mango tree was cut by appellants is not sustainable. Learned counsel also argued that in any case the mango tree was aged more than 100 years and it would not have fetched the quantum of damages awarded by the courts below and Ext.C1 report of the Commissioner should not have been accepted to fix the quantum of damages and hence decree and judgment are not

sustainable.

5. As notice before admission was issued, learned counsel appearing for respondent was also heard. Learned counsel submitted that appellants in the written statement admitted that mango tree was cut by them and courts below on appreciating the evidence rightly found that mango tree was cut by appellants and they are liable to pay damages. It was also pointed out that courts below properly considered the value of the mango tree so cut, in the light of the evidence of PW2, the Commissioner and Ext.C1 report as well as Ext.A3 report submitted by Commissioner in the connected Rent Control Case and in such circumstance no substantial question of law is involved in the appeal.

6. Though learned counsel appearing for appellants vehemently argued that appellants did not admit that they cut the mango tree, a reading of the written statement show otherwise. What was contended in the written statement was that in a violent gale the mango tree was broken and appellants cut the mango tree as it was causing

nuisance and danger to the public. Though learned counsel vehemently argued that what was cut by the appellants was only overhanging branches of the mango tree, that is not the case pleaded in the written statement. In the light of the written statement and evidence, trial court as well as first appellate court entered a factual finding that the mango tree was cut by appellants. That factual finding cannot be interfered in exercise of the powers of this court under section 100 of Code of Civil Procedure by reappreciating the evidence.

7. Appellants are the legal heirs of Vamana Shanbogue. Rent Control Petition was filed before the Rent Control Court. Originally an order of eviction was ordered which was vacated on depositing arrears of rent. It is admitted case that subsequently another R.C.P was filed and an order of eviction was passed and it was pending before Appellate Authority at the time when the mango tree was cut. It was contended by appellants that Vaman Shanbhogue was not a building tenant but was a lesseee as 33 cents was obtained on lease. In the light of the order of eviction in the R.C.P.

under section 11(2)(b) of Kerala Act 2 of 1965, though it was later vacated on depositing the arrears of rent, under section 11(2) (c) that plea is not sustainable.Even if branches of mango tree was overhanging as claimed by appellants and it was causing nuisance and danger to the appellants or the public, appellants have no right to take law into their hands and cut and remove the tree. When it is proved that the tree was cut by appellants, they are liable to pay the damages. Then the only question is on the quantum of damages. The trial court and first appellate court, accepting the report of the Commissioner fixed the quantum of damages at Rs.27,506/-. I do not find any reason to interfere with that finding also. As no substantial question of law is involved in the appeal, appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006